

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
AT CHARLESTON

	x	
	:	
BLUESTONE COAL CORP., et al.,	:	Civil Action
	:	
Plaintiff,	:	No. 2:16-cv-06098
	:	
v.	:	
	:	Date: September 24, 2018
PINNACLE MINING CO., LLC,	:	
et al.,	:	
	:	
Defendant.	:	
	x	

TRANSCRIPT OF TELEPHONIC STATUS CONFERENCE HELD  
BEFORE THE HONORABLE THOMAS E. JOHNSTON, CHIEF JUDGE  
UNITED STATES DISTRICT COURT  
IN CHARLESTON, WEST VIRGINIA

APPEARANCES:  
(All telephonically)

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Proceedings recorded by mechanical stenography;  
transcript produced by computer.

1 PROCEEDINGS had before The Honorable Thomas E.  
2 Johnston, Chief Judge, United States District Court,  
3 Southern District of West Virginia, in Charleston, West  
4 Virginia, on September 24, 2018, at 2:00 p.m., as follows:

5 COURTROOM DEPUTY CLERK: Hi. It's Staci in Judge  
6 Johnston's chambers. Who do I have on the line for the  
7 plaintiff?

8 MR. NELSON: David Nelson and Scott Long.

9 COURTROOM DEPUTY CLERK: And how about for the  
10 defendants?

11 MR. ROSE: Dennis Rose for Cliffs.

12 MR. HANCOCK: Tom Hancock, also for Cliffs.

13 MR. MACCORKLE: John MacCorkle for Ken & Coy.

14 MS. JOHNSON: Diana Johnson for TAM International,  
15 Inc.

16 MR. MEADOWS: John Meadows for Seneca defendants  
17 and Pinnacle.

18 MR. SBROLLA: Phil Sbrolla on behalf of C&J  
19 defendants.

20 COURTROOM DEPUTY CLERK: Anyone else?

21 Hearing no one, I'll get the judge. Hold on just a  
22 moment.

23 (Pause)

24 UNIDENTIFIED SPEAKER: Did anyone identify Josh  
25 Berman on the phone? You might want to add that again,

1 John. I just heard it ding.

2 MR. BERMAN: Hi, folks. This is Josh Berman from  
3 White & Case. I apologize. I had difficulty dialing.

4 (Pause)

5 THE COURT: Good afternoon. This is Judge  
6 Johnston. This is a telephonic status conference in  
7 Bluestone v. Pinnacle, and others, civil action number  
8 2:16-cv-06098.

9 I have in my chambers my law clerk, Lesley Shamblin; my  
10 courtroom deputy, Staci Wilson; and my court reporter, Ayme  
11 Cochran.

12 We are on the record. I will ask that you identify  
13 yourselves when you speak so that we can make a clear  
14 record.

15 And will counsel please note their appearances?

16 MR. NELSON: For the plaintiffs, David Nelson and  
17 Scott Long of the Law Firm of Hendrickson & Long.

18 MR. BERMAN: For defendants, Seneca and Pinnacle,  
19 this is Josh Berman from the Law Firm of White & Case. I  
20 believe my colleague, Ron Gorsich, is on the line, as well.

21 MR. ROSE: Dennis Rose for Cliffs.

22 MR. HANCOCK: Tom Hancock also with Cliffs.

23 MS. JOHNSON: Diana Johnson, TAM International,  
24 Inc.

25 MR. LASOTA: Doug LaSota, counsel for Pinnacle.

1 MR. MACCORKLE: John MacCorkle for Ken & Coy.

2 MR. MEADOWS: John Meadows for Seneca defendants  
3 and Pinnacle.

4 MR. SBROLLA: And Phil Sbrolla on behalf of C&J  
5 Energy.

6 MR. HACKLEY: Grant Hackley on behalf of Pinnacle.

7 THE COURT: All right. The conference today was  
8 set as a result of a motion filed by Bluestone. And so, I  
9 will hear from Bluestone first.

10 MR. NELSON: Yes, Your Honor. David Nelson. Your  
11 Honor, we had asked for this status conference out of some  
12 concern over experience with these types of case in general,  
13 and this case, in particular, over the fact that we had  
14 gotten unclear confirmation, and perhaps there was some  
15 differential between the order that Your Honor entered and  
16 what Your Honor had directed in the transcripts or at the  
17 last telephonic hearing about making sure that all insurance  
18 representatives would be in attendance at the October 2nd  
19 settlement conference and, also, our knowledge that, quite  
20 often, insurance matters, i. E., issues that are purely  
21 between the insurance carriers themselves and the insured,  
22 often cause substantive negotiations between the mitigating  
23 parties to be delayed and not go forward. We were concerned  
24 that if there was any assistance that might take place prior  
25 to the settlement conference in terms of ensuring that those

1 matters had been addressed and taken up with the carriers to  
2 ensure, one, their attendance; and, two, that they had among  
3 themselves been able to at least, if nothing else, identify  
4 issues or prioritize their coverages before we are all there  
5 before Your Honor on October 2nd. That would be of great  
6 assistance to ensuring that the settlement conference could  
7 proceed and actually accomplish something, as opposed to  
8 breakdown between discussions among and between insurance  
9 carriers.

10 There's been quite a bit of time. We were in  
11 communications with, in particular, Pinnacle's and Seneca's  
12 counsel back in June and July and we understand that energy  
13 was invested at that time to make some progress about  
14 coverages, about the depletion of self-insured retentions or  
15 deductibles, and then the communication with potential  
16 excess insurance carriers.

17 It's not our intent to -- to attempt to get into, you  
18 know, the parties' preparation or willingness on any  
19 settlement that might be discussed, but simply trying to  
20 figure out whether these carriers have worked out their  
21 priority, or at least are close to it, before requiring the  
22 Court to get involved. So, that was our concern.

23 THE COURT: All right. Fair enough. I -- I  
24 understand that. Let's get a report on where we stand on  
25 that. That was the subject of some discussion in our

1 earlier conference calls this summer. So, where do we stand  
2 on the coverages?

3 I'm sorry.

4 MR. NELSON: I apologize. That was all -- that  
5 was all that I had to say on that point, Your Honor. That's  
6 our concern about this conference.

7 THE COURT: I'm sorry. I had my mute button on.  
8 No, I -- I understand your concern. The various coverages  
9 were discussed, at least to some extent, in our conference  
10 calls earlier this summer. So, let's get a report on where  
11 that stands.

12 MR. BERMAN: Judge, this is -- it's Josh Berman  
13 from White & Case on behalf of Seneca and Pinnacle. I am  
14 happy to tell you which carriers have said what. The only  
15 thing I want to say is that, if Mr. Nelson is concerned  
16 about the insurance companies' willingness and ability to  
17 show up and put an offer on the table, or help the parties  
18 get somewhere in the settlement conference, then we are  
19 doubly concerned because, from the standpoint of Pinnacle,  
20 that's really the sole source of funds and, otherwise, we're  
21 out of business. So, our interest is in getting the  
22 carriers before Your Honor to the courtroom and  
23 participating in good faith.

24 I'm going to give you the list. AIG, these are --  
25 these are Cliff insurers who are also insurers of Pinnacle,

1 and then there's some other insurers that we'll get to. AIG  
2 has confirmed that it will attend on behalf of both Pinnacle  
3 and Cliffs. AIG is not paying defense fees, but that's --  
4 that's neither here nor there.

5 Chubb will be present, but Chubb has -- and I should  
6 mention that AIG has a -- you know, one of these ten-page  
7 reservation of rights in place. So, they're going to  
8 attend, but they've reserved all rights, obviously, as to  
9 liability under the policy and to say nothing about  
10 liability of the case of their insureds, namely, the  
11 defendants.

12 Ace and Chubb will be present. There's at least  
13 \$25 million dollars of coverage there. Again, appearing on  
14 behalf of both Pinnacle and Cliffs, again, with a  
15 reservation of rights that is somewhere near the length of 1  
16 a piece.

17 The next one in the stack, Judge, is really, frankly, a  
18 problem. Star Indemnity is an excess carrier with -- with  
19 another \$25 million. For reasons we don't know, they have  
20 yet to provide -- actually, I think I saw communications  
21 from them earlier today. At least as of my preparations for  
22 this hearing this morning, we haven't gotten a full coverage  
23 position letter from Star, but they did tell us that they  
24 will be attending the settlement conference, but only on  
25 behalf of Cliffs. How the insurer can take that position is



1 absolutely a mystery to Pinnacle because Cliffs was the  
2 owner of Pinnacle at the time of the alleged borehole  
3 incident and Pinnacle and the subsidiary of Cliffs,  
4 therefore, may have been short. So, in fact, Cliffs is only  
5 in this case on -- really, on a veil-piercing theory. And  
6 so, we don't understand Star's position at all.

7 I also want to say, Judge, that if you hear some  
8 frustration in my voice about the reservation of rights and  
9 the difficulties we've had getting the carriers to the  
10 table, it is because we have been at this for something in  
11 the order of three or four months now and we are frustrated  
12 with the carriers' behavior. And there may come a time, and  
13 I would say that time would be October 3rd, when the Court  
14 expects us to be filing third-party complaints against some  
15 or all of the insurance carriers, which I expect the  
16 plaintiffs in this case, namely, Bluestone, wouldn't oppose  
17 but, of course, I will leave it to them to state their  
18 position.

19 Ace Westchester, another \$25 million, again, has  
20 indicated that they'll be appearing on behalf only of  
21 Cliffs.

22 I also want to -- as I said, apparently Star's letter  
23 this morning said that they thought literally this morning  
24 that they will appeal on behalf of Pinnacle and Cliffs  
25 subject to the reservation of rights.

1           Ace, however, which is the next \$25, is coming only on  
2           behalf of Cliffs. So, the mystery remains.

3           Ironshore, which is the next \$25 million, is not  
4           showing up. They haven't confirmed to us that they'll be --  
5           that they'll be coming to the conference before Your Honor  
6           and we sent them multiple correspondence on letterhead  
7           beginning on March -- in March of 2018 and continuing  
8           through August.

9           Let's see. The next is Excel, which is \$15 million  
10          excess. We wrote to them on September 21st, which is  
11          Friday. That was the most recent administrative  
12          communication. And they haven't told us they're going to  
13          appear on behalf of Pinnacle. And they've not given us a  
14          formal coverage position letter.

15          And I will tell you, Judge, there are -- I have now  
16          become immersed in some of the West Virginia insurance  
17          statutes and, you know, it is my understanding, based also  
18          on conferring with various counsel in Charleston, that these  
19          carriers --

20          (Telephonic interruption)

21          MR. BERMAN: -- in a position definitively within  
22          15 days. And so, we are at a loss as to why we are -- we  
23          still haven't heard clearly from the majority of the stack  
24          that I've just articulated. And so, the carriers I just  
25          went over, Judge Johnston, takes us to \$175 million dollars.

1 I neglected to mention Argo, which is the last \$25  
2 million in the stack. Again, we sent them multiple  
3 correspondence and they simply haven't confirmed that  
4 they're going to attend.

5 So, the good news is, everyone up to the last -- other  
6 than Ironshore and Argo will be there. The bad news is  
7 that, at least Ace, which is \$25 million, between \$50 and  
8 \$75, is there only on behalf of Cliffs.

9 There are a couple of other small insurance policies  
10 that -- for the entirety of the drilling company had these  
11 policies and they enured to the benefit of Pinnacle.

12 Arch is going to be there on behalf of Pinnacle.  
13 They've only got a million dollars left.

14 Zurich is going to be there. They've got a \$5 million  
15 limit. And they'll be there on behalf of Pinnacle.

16 And Great West (phonetic) is going to be there on  
17 behalf of Pinnacle, although he we don't have a position  
18 letter.

19 Both options reserve their rights.

20 So, you know, from our standpoint, we have -- we share  
21 Mr. Nelson's frustration and concern, but we have moved  
22 heaven and earth to do everything we can, Judge, to have the  
23 carriers present and willing to participate in the  
24 settlement conference in good faith.

25 I don't think that the hearing today -- and I'm not

1       sure Mr. Nelson asked; in fact, I think he may have  
2       specifically not asked, but I can't comment on the insurers'  
3       willingness to enhance proceeds towards a settlement. We  
4       certainly -- from our standpoint, Pinnacle and Seneca, it is  
5       in our interest that they do, irrespective of liability  
6       because it would protect my client, but I think that really  
7       sums up where we are and gives you a lot of the flavor of  
8       the efforts we've taken and the static we've encountered in  
9       trying to get the full stack to the conference on the 2nd.

10           And I really do want to say to the Court that we are,  
11       to some extent, you know, may anticipate a third-party  
12       action against at least some of the insurers from my  
13       clients, or from Pinnacle, I should say.

14           I hope that answers your question, Judge, and -- or Mr.  
15       Nelson's questions. If there's anything else, I'm certainly  
16       happy to address it.

17           THE COURT: Well, let me just ask, just so I'm  
18       clear, it sounds to me like reservation of rights or not,  
19       all but two of the carriers with potential coverage here are  
20       planning on being there; is that correct?

21           MR. BERMAN: Let me just count them up to make  
22       sure that's right. All but -- yes. All but three are going  
23       to be there. A third will be there only on behalf of  
24       Cliffs, but not on behalf of Pinnacle. And the company I'm  
25       referring to now is Ace, Westchester Surplus, which covers

1 the \$50 to \$17 -- sorry, \$50 to \$75 million level stack.  
2 So, essentially, Your Honor, right, with one small caveat.

3 THE COURT: Okay. Well, I can't recall, and I  
4 don't have it in front of me right now. Have I ordered all  
5 insurance carriers with potential coverage in this case to  
6 be present by representatives in person? I know I ordered  
7 the company principals to be here, but have I ordered the  
8 insurance carriers with potential coverage to be here?

9 MR. BERMAN: I believe you did, Your Honor. The  
10 only -- and I -- this is Josh again. The way you just  
11 worded it, which is, "have I ordered the carriers of  
12 potential coverage to be present", I gathered you ordered  
13 carriers to be present with personal representatives. I  
14 don't remember if it was all carriers with potential  
15 coverage. Maybe someone else has the recollection.

16 MR. NELSON: Your Honor, David Nelson for the  
17 plaintiffs. You clearly verbally at, I believe, the  
18 July 27th conference that you conducted by phone directed  
19 that verbally to the parties in the manner that Mr. Berman  
20 just described. The Court's written order, I don't believe,  
21 mentioned insurance carriers specifically, but we were all  
22 present on the phone and that, frankly, was one of the  
23 reasons, as I mentioned earlier, that we had some concern  
24 about this being clarified a distance out from the actual  
25 settlement conference.

1           THE COURT: Well, I can certainly do an order  
2 clarifying that, and that would be much more problematic for  
3 next Tuesday if it wasn't for the fact that we're -- it  
4 appears we're only talking about two carriers out of the  
5 lengthy list that we heard there. That's -- if we were  
6 talking about most of the list, that might become a problem,  
7 but with two carriers being the only issue, I would have no  
8 problem with entering an order today clarifying that and  
9 requiring them to be here.

10           Is there any objection to that?

11           Hearing none --

12           MR. BERMAN: Your Honor --

13           THE COURT: Go ahead, whoever that was.

14           MR. BERMAN: No, it's Josh. Sorry. I forgot  
15 about Your Honor's protocol where you just stay silent.

16           THE COURT: Okay. All right. Well, I'm -- I'm  
17 going to take a look at my old orders, but my intention  
18 right now is, I'll put out an order today or tomorrow  
19 requiring all carriers with potential coverage to be present  
20 in person with representatives with full settlement  
21 authority.

22           All right. Mr. Nelson, does that allay some of your  
23 concerns?

24           MR. NELSON: Yes, Your Honor. I think that  
25 addresses just about everything. We had some questions

1 about the -- whether the carriers were taking unreasonable  
2 positions about exhaustion of retentions and such, but I  
3 don't think that matter is going to stumble things up to the  
4 extent that others would and, certainly, Mr. Berman's -- Mr.  
5 Berman and Cliffs, as well, I think, have a confluence of  
6 interest with the plaintiffs on that point and they'll be  
7 able to push through that on the morning of the conference  
8 if -- if they're not able to do so beforehand.

9 THE COURT: All right. Very well.

10 A couple other matters we need to discuss. One is  
11 that, again, I should have this in front of me, but I don't.  
12 What time is the conference scheduled to start? It's  
13 scheduled to start at 10:00? Hang on just a second. I need  
14 to ask my staff something.

15 (Pause)

16 THE COURT: Yes. So, we've got a lot going on  
17 here at the courthouse next Tuesday. The trial of Justice  
18 Loughry starts Tuesday and Judge Copenhaver ordered extra  
19 jurors, or potential jurors, to be brought in for jury  
20 selection that morning. And the Clerk's Office, in order to  
21 find a space big enough to process them, is going to be  
22 using my courtroom here on the seventh floor for that  
23 purpose. But they've told me that they will be done with  
24 the courtroom by 9:30.

25 So, just to let everybody know, you probably don't want

1 to come too early for our 10:00 proceeding because there  
2 will be probably a pretty big crowd up here on seven until  
3 around 9:30 a.m. I had thought originally, when I was  
4 corresponding, I was out of town late last week and  
5 corresponding with my staff about this, that maybe I had set  
6 this for 9:00 and that would present an issue, but we've got  
7 plenty of space here. I'm just trying to help Judge  
8 Copenhagen out with the proceeding he has -- he will have  
9 going on next week.

10 Let me see. There's a couple of other things I wanted  
11 to raise myself and then I'll give the parties an  
12 opportunity to raise anything else they might want to raise.

13 Oh, there's a motion to excuse the defendant from  
14 settlement conference as Docket 311 filed by TAM  
15 International. I'm a little perplexed by this one. It  
16 represents and, as far as I know, there's been no response  
17 to it, that plaintiffs have agreed to dismiss TAM  
18 International from the case, but have been unable to secure  
19 the agreement of the co-defendants. Where does that stand?

20 UNIDENTIFIED SPEAKER: Judge --

21 MS. JOHNSON: Your Honor, this is Diana Johnson.  
22 You are correct. And Dave will speak, and agree, I'm sure,  
23 that they've agreed to dismiss. And we've been trying to  
24 secure that dismissal for several months and all but one  
25 co-defendant has agreed to sign off on that, but Cliffs has



1 refused so far.

2 THE COURT: What's the reason for that?

3 MR. ROSE: Your Honor, Dennis Rose. One is, this  
4 request was right before the mediation. There's been not  
5 one e-mail, letter, or other request on this motion to  
6 dismiss that they are suggesting that. And so, we -- we  
7 agreed to it and, despite the fact there's been a number of  
8 hearings and/or depositions, that TAM has shown up.

9 And the bottom line is, they filed a cross-claim  
10 against Cliffs in this case for indemnity and, at least  
11 right now, we have an interrogatory answer from the  
12 plaintiffs saying that TAM was there and could have done  
13 something to advise this borehole not to be drilled in the  
14 way that it was negligently drilled. So, right now, the  
15 intent is to oppose the summary judgment and they should  
16 show up next week.

17 THE COURT: I'm having trouble following that  
18 response.

19 MR. ROSE: Well, the similar issue, Your Honor, is  
20 saying, "Let us out of the case" because no expert has  
21 identified them in an expert report. And that is not the  
22 way that you let somebody out.

23 One of the questions I think I have for Ms. Johnston  
24 [sic] is, would they be willing to allow the dismissal of  
25 the counterclaims and cross-claims from both parties without

1 prejudice so, if something happens in this case later down  
2 the road, both TAM and Cliffs could pursue whatever  
3 contribution or indemnity claims.

4 Ms. Johnston [sic], are you willing to do that?

5 THE COURT: Well, hang on a second. I'm in charge  
6 of this call, not you.

7 Ms. Johnson -- and, just so we're clear, her name is  
8 "Johnson" and my name is "Johnston". There's no relation.

9 Ms. Johnson, what's your position?

10 MS. JOHNSON: I think that's probably okay. I  
11 need to give that some thought but, I mean, I know TAM is  
12 definitely willing to dismiss their cross-claim, which was  
13 filed as part of their answer to reserve the rights under  
14 the Rules of Civil Procedure and we are willing to dismiss  
15 that.

16 THE COURT: Does that solve the problem?

17 MR. ROSE: And allowing the dismissal of Cliff's  
18 claim being without prejudice, Your Honor?

19 THE COURT: Well, let me -- hang on a second. I'm  
20 a little slow. We're talking about TAM's cross-claims  
21 against Cliffs or Cliffs cross-claims against TAMS?

22 MR. ROSE: They want -- and, Your Honor, again, I  
23 apologize for the "Johnston" and the "Johnson". So, I'm  
24 sorry about that. But they want us to dismiss with  
25 prejudice the indemnity and contribution claims that we have

1 and these are claims that we have against -- Cliffs has  
2 against Pinnacle and other defendants, as well, but they  
3 weren't affirmatively alleged because cross-claims weren't  
4 filed. If they are willing to have us have a  
5 without-prejudice dismissal so that, in the future, we can  
6 go after TAM, if there's some reason, we are fine with that.

7 THE COURT: Ms. Johnson?

8 MS. JOHNSON: That will be okay.

9 THE COURT: Well, there we go.

10 MR. ROSE: Someone will prepare an order, Your  
11 Honor. I'll work with Ms. Johnson to figure out an order  
12 and we'll submit it.

13 THE COURT: Very well. Under the circumstances  
14 then, unless there's some other objection, I don't think  
15 it's necessary for TAM to participate on Tuesday.

16 MS. JOHNSON: Thank you, Your Honor.

17 THE COURT: You're welcome.

18 Anybody else have anything to raise?

19 MR. ROSE: Yes, Your Honor. Dennis Rose again.  
20 We had asked plaintiffs through discovery and follow-up to  
21 give us any first priority insurance that they have, you  
22 know, for the equipment that's involved in this case or any  
23 claims that they have filed on their own insurance carriers  
24 and any payments they've gotten on those claims. We believe  
25 all of that is discoverable for a number of reasons in this

1 case. And I'm still waiting for a response from plaintiffs.  
2 They haven't said yes or no on that. But since this is an  
3 insurance topic we're talking about today, we would like to  
4 have that information produced. We think it may be helpful  
5 for all the parties to have that in advance of October 3rd  
6 so that it may be useful information as we approach this  
7 settlement conference.

8 MR. NELSON: Your Honor, David Nelson on behalf of  
9 the plaintiffs. We have responded to the -- multiple  
10 defendants, in fact, I think, made the request about whether  
11 we received any payments. We have not received payments.  
12 There was a claim open with our carriers, and then, that  
13 claim was not pursued, and it has not -- it's not going  
14 forward as we speak.

15 I have requested the specific policy information from  
16 the client, from corporate counsel and, Your Honor, I  
17 followed up on it again last week. As soon as I get it, we  
18 have absolutely no problem with providing it to anyone.  
19 However, we do not understand how it's relevant to today.

20 We've received no payment and, further, it is clearly  
21 under the rules of collateral resource that it would not  
22 impact any aspect of the settlement proceedings. So, that's  
23 our position on it, but we have no objection to providing  
24 the deck sheets and policies that could have been implicated  
25 but, again, there have been no payments and the parties can

1       rely on that. We have already verified that.

2               THE COURT: Well --

3               MR. ROSE: Your Honor -- Your Honor, what we're  
4       looking for is the claim that was submitted and withdrawn.  
5       Obviously, we want the policies, as well, but the claim  
6       that's going to be relevant to what type of claim they've  
7       asserted to their own carriers and I think that could be  
8       relevant for a number of reasons in this case, nothing to do  
9       with collateral resources.

10              THE COURT: Well, I don't really -- other than the  
11       fact that you've attracted my attention to another pot of  
12       money here, I'm not really inclined to get into a discovery  
13       dispute hearing on this call. So, my -- but now that we've  
14       discussed it, it sounds to me like, potentially, there's  
15       another pot of money here, so the order that I entered might  
16       be broad enough to bring them in.

17              I mean, Mr. Nelson, why would you object to having  
18       another carrier here potentially to contribute to a  
19       settlement?

20              MR. NELSON: (Unintelligible).

21              THE COURT: Mr. Nelson, you're breaking up.

22              MR. NELSON: Yes. Yeah. And you were breaking up  
23       before. I did not hear what you said. Do you want us to  
24       dial back in?

25              THE COURT: No, no. You're better now. I don't

1 know what happened there. I was saying why --

2 MR. NELSON: (Unintelligible).

3 THE COURT: Can you hear me now?

4 MR. NELSON: Yes, and I'll be quiet.

5 THE COURT: Okay. I was just saying, why wouldn't  
6 you want another carrier here with another pot of money,  
7 even if it's your own carrier? I mean, why couldn't -- why  
8 shouldn't I write my order broadly enough to include them?

9 MR. NELSON: Your Honor, if you want our first  
10 priority carriers to come to the meeting, we'll do what we  
11 can to get them there, but these are carriers that we have  
12 not been pursuing any communications with for the past year  
13 and a half and I don't know what they would have to offer,  
14 but if Your Honor wants us to get them here, that's fine. I  
15 don't believe they're going to be providing any meaningful  
16 participation and they have not yet received any notice  
17 because they're not liability carriers.

18 And, frankly, I think it may create problems that --  
19 and an entanglement that could slow things down rather than  
20 clear things up, but if Your Honor wants them there, we will  
21 -- we will comply.

22 THE COURT: What's the defendants' position on  
23 that?

24 MR. ROSE: Having -- (unintelligible) in the  
25 policies -- (unintelligible) -- other than, if it's someone

1 who potentially could have some liability as a carrier, then  
2 why shouldn't they be there like everyone else?

3 THE COURT: Who is that?

4 UNIDENTIFIED SPEAKER: Judge, for Pinnacle and  
5 Seneca --

6 THE COURT: Hang on. Hang on. Hang on. Hang on.  
7 Who was the first person that spoke there?

8 MR. ROSE: I'm sorry, Your Honor, that's Dennis  
9 Rose again for Cliffs.

10 THE COURT: All right. Make sure you identify  
11 yourselves when you speak.

12 Somebody else started.

13 MR. BERMAN: Your Honor, this is Josh Berman for  
14 Pinnacle and Seneca. We would certainly love to see the  
15 plaintiffs' carriers there for a number of reasons that I  
16 think -- and I'm hopeful, at least, that it could actually  
17 materially advance the Court's objectives.

18 THE COURT: Well, here's what I'm going to do.  
19 I'm going to word the order broadly, as I indicated earlier,  
20 to say that any carrier with potential coverage for this  
21 case should be present. I don't really -- this is the first  
22 I've kind of heard of first-party coverage for the  
23 plaintiffs, so I'm at -- I'm -- you all say you are at a  
24 loss about it. I'm certainly at a loss about it, but I'm  
25 going to word that broadly, and I think, when in doubt, the

1 carrier should probably be here.

2 MR. NELSON: Your Honor, again, we already said we  
3 don't have -- this is David Nelson. We have no objection.  
4 We may have -- we may get some blow-back from the people who  
5 are involved on short notice, but we certainly will press  
6 them to be here and let them know that there's a court order  
7 requiring them to be here.

8 The only thing I would add, so that it's of no surprise  
9 next week, is that normally any carriers who are  
10 first-party, who make payment and participate, are expecting  
11 a right of subrogation and that normally comes right back  
12 into their pocket. So, I don't know what assistance that  
13 could be to these defendants but, again, we'll comply with  
14 Your Honor's order.

15 THE COURT: Well, you all can think that through  
16 and, if the parties change their position with regard to  
17 your first-party carriers, you can let me know, but I'm -- I  
18 would rather -- in general, I would rather include more than  
19 fewer potential pockets.

20 MR. NELSON: Your Honor, just -- David Nelson  
21 again. Just to be clear, I think the Court and everyone  
22 understands, that we don't control them and we will let them  
23 know, but they have not been a party who has been on notice  
24 of this settlement conference or, for that matter, anything  
25 about this claim for a year and a half, but we'll let them



1 know.

2 THE COURT: Fair enough.

3 One other thing I thought of, and I meant to mention  
4 this earlier, is that it might be helpful for me to have a  
5 statement from each side with regard to the status of the  
6 litigation settlement negotiations, et cetera. I don't want  
7 you to write books, though, and I would prefer, where  
8 possible, that you provide -- like, on the defense side, if  
9 you can, provide joint statements, but I would suggest that  
10 -- you know, we're meeting on Tuesday, the 2nd. Perhaps by  
11 the end of this week, you could submit something no longer  
12 than, say, ten pages just to give me an orientation to the  
13 case and to the posture of the settlement discussions  
14 leading up to our meeting.

15 Is there any objection to that?

16 MR. NELSON: Your Honor, David Nelson on behalf of  
17 the plaintiffs. Our only question is, is that -- it's not  
18 an objection, but is that meant to be a confidential  
19 statement, or is this a shared -- a statement to be shared  
20 with all parties?

21 THE COURT: Well, if there's no objection, let's  
22 do it confidentially. I actually don't usually do this, so  
23 -- I know mediators do this a lot and I think they do it on  
24 a confidential basis. So, if there's no objection, why  
25 don't you submit them confidently to me. You can actually

1 submit them directly to Ms. Shamblin.

2 Is there any objection to that?

3 Hearing none, that's the way we will proceed.

4 Anybody else have anything they need to raise today in  
5 advance of next week's proceedings?

6 All right. Hearing none --

7 MR. GORSICH: Your Honor, Ron Gorsich with White &  
8 Case.

9 THE COURT: Yes.

10 MR. GORSICH: Because there's been confusion in  
11 the past, I just want to confirm that dispositive motions  
12 are due on October 1st, and that no party thinks otherwise.

13 THE COURT: Well, I'm not hearing anything,  
14 although it sounds to me like it doesn't make a whole lot of  
15 sense to file dispositive motions the day before we have  
16 this big settlement conference.

17 MR. GORSICH: Ron Gorsich again, Your Honor. We  
18 agree. We actually thought they were due three weeks later,  
19 but there was a dispute about that, as you're aware.

20 THE COURT: Right. Well, it doesn't make any  
21 sense to have you all filing that stuff the day before the  
22 settlement conference, so why don't we just say that, in the  
23 unlikely event that this case doesn't settle next week, that  
24 we will re-set the dispositive motion dates?

25 Is there any objection to that?

1           Hearing none, we'll proceed that way, and you won't  
2           have to prepare those motions in the meantime.

3           I am very serious. Mr. Nelson, at the very least, has  
4           been through this process with me before with a similar  
5           grouping of parties and I am very serious about getting this  
6           case settled next week. So, I look forward to seeing  
7           everyone also with a -- bringing a view to working in that  
8           direction.

9           Anything else we need to deal with today?

10          Hearing none, have a good day. I'll see you next week.

11          (Proceedings concluded at 2:40 p.m., September 24,  
12          2018.)

13

14          CERTIFICATION:

15                 I, Ayme A. Cochran, Official Court Reporter, certify  
16                 that the foregoing is a correct transcript from the record  
17                 of proceedings in the matter of Bluestone Coal Corp., et  
18                 al., Plaintiffs v. Pinnacle Mining Co., LLC, et al.,  
19                 Defendants, Civil Action No. 2:16-cv-06098, as reported on  
20                 September 24, 2018.

21

22                 s/Ayme A. Cochran, RMR, CRR

October 1, 2018

23                 Ayme A. Cochran, RMR, CRR

DATE

24

25